IN THE SUPREME COURT OF THE STATE OF NEVADA

MARVIN MORAN,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 67881

RESPONDENT'S ANSWERING BRIEF

Appeal From Judgment of Conviction
Eighth Judicial District Court, Clark County

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ROUTING STATEMENT: This appeal is not presumptively assigned to the Court of Appeals pursuant to NRAP 17(b)(1) because it is an appeal from the Judgment of Conviction involving a conviction for Category A offenses.

STATEMENT OF THE ISSUES

1. **Whether district court did not abuse its discretion in granting the State's Motion to Continue Moran's Trial.**
2. **Whether district court did not err in admitting prior bad act evidence.**
3. **Whether the district court did not err in allowing Zachary Johnson to testify.**
4. **Whether Barral does not warrant reversal.**
5. **Whether the district court properly instructed the jury.**
6. **Whether the State did not commit prosecutorial misconduct.**
7. **Whether the State presented sufficient evidence to convict Moran of the charged crimes.**
8. **Whether Moran has not demonstrated cumulative error.**

STATEMENT OF THE CASE

On July 24, 2014, Marvin Moran ("Moran") was charged by way of Indictment with:

Count 1 – Burglary while in Possession of a Deadly Weapon (Category B Felony – NRS 205.060 – NOC 50426); Count 2 – First Degree Kidnapping with Use of a Deadly Weapon (Category A Felony – NRS 200.310, 200.320, 193.165 – NOC 50055); and Count 3 – Murder with Use of a Deadly Weapon (Category A Felony – NRS 200.010, 200.030, 193.165 – NOC 50001). 1 Appellant's Appendix ("AA") 1-3.

On January 13, 2015, Moran was convicted after a six-day jury trial of the charges contained in the Indictment. 5 AA 1183-84. On March 30, 2015, Moran was sentenced to the Nevada Department of Corrections as follows: Count 1 – a maximum of 180 months and a minimum of 72 months; Count 2 – 5 years to life plus a consecutive minimum term of 96 months and a maximum of 240 months for the use of a deadly weapon, to run concurrent with Counts 1 and 3; and Count 3 – 20 years to life plus a consecutive minimum term of 96 months and a maximum of 240 months for the use of a deadly weapon, to run consecutive to Count 1 and concurrent with Count 2. 5 AA 1189-90. Moran received 291 days credit for time served. Id. The Judgment of Conviction was filed on April 8, 2015.[1] Id.

On April 24, 2015, Moran filed a Notice of Appeal. 5 AA 1194-97.

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[1] An Amended Judgment of Conviction was filed on April 21, 2015, correcting a clerical error. 5 AA 1191-93.

STATEMENT OF THE FACTS

Before their divorce, Iris Moran ("Iris") and Moran had been married for 13 years. 9 AA 1888-90. They would often fight about money and their relationship. 9 AA 1888-92. Moran would become physically violent toward Iris. 10 AA 2240-41. In December 2013, Iris began dating another man and occasionally spoke with her supervisor at the MGM Grand Hotel regarding her relationship problems. 8 AA 1758-59; 10 AA 2225. At times, Iris was afraid and her supervisor would accompany her to the hotel door "for her own safety." 8 AA 1759-60.

On March 11, 2014, Moran installed a software application on Iris' smartphone known as "Letmespy." 9 AA 1872-73. This application secretly extracts data such as text messages, geographic locations, and incoming and outgoing call logs, and transmits it to another user. 9 AA 1873-74, 1894-95. Iris was suspicious of Moran and so, a family friend gave Iris an older-model "flip" style cellphone in order to have more privacy. 8 AA 1777.

On June 13, 2014, Iris left MGM at 4:58 a.m. 10 AA 2097. At approximately 6:30 a.m., Las Vegas Metropolitan Police Department ("LVMPD") Officer Beaumont Hopson responded to 2606 South Durango Drive, Clark County, Nevada. 8 AA 1790-92. Officer Hopson was dispatched because Moran dialed 9-1-1 from Iris' "flip" phone[2] and stated that a "bitch" "was hurt or dying in an apartment and

[2] Iris' "flip" phone was never recovered. 8 AA 1818-19.

he added that this is not a joke."[3] 8 AA 1792, 1818-19; 9 AA 1914-1915; 10 AA 2113-14. Specifically, Moran stated that the incident had occurred at apartment "873." 8 AA 1793.

When Hopson arrived, he discovered that no number "873" existed, so he decided to investigate apartments numbered "173" and "273." 8 AA 1793-94. After clearing apartment 173, Hopson was surprised to find the door to apartment 273 unlocked. 8 AA 1795-97. After knocking and receiving no response, Hopson opened the door to look inside, and saw Iris' dead body. Id. Iris had "been badly beaten" and there was "a pool of blood." 8 AA 1800, 1809. A yellow rope bound Iris' hands together behind her back. 8 AA 1809. "She had severe injuries to her head, as well as her face. Her left and right ring fingers had severe lacerations . . . it appeared she had a broken nose. There was a hole on the right side of her mouth and her cheek area, where there was foam coming out . . . It also looked like she had broken teeth. Her lips . . . and mouth had [also] sustained injuries." Id. Iris was beaten so brutally that pieces of her teeth and dentures were found across the room. 8 AA 1835. Iris had defensive wounds on her hands and forearms and her own hair was found in her hands—indicative of someone putting her hands up to protect herself. 10 AA 2093-94.

[3] At trial, multiple witnesses identified Moran as the 9-1-1 caller.

There were no signs of forced entry. 8 AA 18011; 10 AA 2095. The contents of Iris' purse were dumped on the floor near her body. 8 AA 1811-13. Among the items found near Iris' body was a Samsung Galaxy smart phone and a cellphone case for an older-model "flip phone." 8 AA 1814-15.

Moran returned home around 8:45 a.m. 9 AA 1902. The two front floor mats in his Toyota Corolla were missing. 9 AA 1903-04. Shortly after, Moran was stopped by police as he attempted to leave his home in the Toyota Corolla. 8 AA 1817; 10 AA 2098. Moran was not placed under arrest and was told that he was free to leave. 10 AA 2102. Moran, considered a potential witness or lead in the investigation became visibly nervous when the conversation turned to Iris. 10 AA 2104. When asked what apartment Iris lives in, Moran responded, "873." Id. When asked about Iris' apartment, Moran was "shutting down," covered his face with his hands, avoided eye contact, sweated profusely, he was visibly shaking, and his heart was "pounding." Id.

No longer considered to be merely a witness, Moran was informed of his rights pursuant to Miranda.[4] 10 AA 2105. Moran stated that Iris had been "hanging out" with "[u]nseemly, degenerate type people that were guiding her in the wrong direction in her life, away from the goodly things; marriage, God," and that "[h]e

[4] Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966).

wanted her to behave." 10 AA 2105-06. Moran also revealed that he knew Iris' work schedule exactly. 10 AA 2106-07. Initially, Moran did not ask police why they were conducting an investigation and never inquired into the cause of Iris' death. 10 AA 2112, 2162. Moran stated that there "would be some of her DNA in the vehicle." 10 AA 2156. Later, Moran again stated that Iris' apartment number is "873." Subsequently, in a letter, Moran stated that his DNA and fingerprints would be found at Iris' home. 10 AA 2156-57. However, at trial, Moran stated that during the time of the murder, he was driving around searching for a location to hold a yard sale.[5] 11 AA 2358.

ARGUMENT

1. The district court did not abuse its discretion in granting the State's Motion to Continue Moran's Trial.

On September 29, 2014, the State filed a Motion to Continue Jury Trial.[6] 2 AA 395-402. Moran complains that this Motion "[w]as filed less than 15 days before trial" and "did not contain an affidavit explaining the grounds for making such a

[5] Although he claimed that he planned to hold a yard sale, curiously, one week prior to the murder, and again, the night before the murder, Moran pawned numerous items. XI AA 2395-97.

[6] On September 17, 2014, Moran's counsel made an oral motion to stay the proceedings, which the district court granted. 5 AA 1203. This motion was based on the district court's denial of Moran's pretrial Petition for Writ of Habeas Corpus. Id. However, on September 22, 2014, Moran subsequently informed the court that despite his counsel's advice, he wished to proceed with trial. 5 AA 1204. Nonetheless, by filing a pretrial Petition for Writ of Habeas Corpus, Moran waived his statutory right to a speedy trial. NRS 34.700(b)(1).

motion after the time provided or at trial." AOB at 21 (internal quotation omitted). Additionally, Moran asserts that the "district court failed to address the motion's merits and instead granted the motion after finding [Moran] waived his right to a speedy trial." AOB at 21. However, these claims are without merit.

NRS 174.515 provides that "[w]hen an action is called for trial, or at any time previous thereto, the court may, upon sufficient cause shown by either party by affidavit, direct the trial to be postponed to another day." The decision to grant trial continuances is "within the sound discretion of the district court and will not be disturbed absent a clear abuse of discretion." Wesley v. State, 112 Nev. 503, 916 P.2d 793 (1996). Further, the trial judge enjoys "wide discretion" to grant a motion for continuance. Sessions v. State, 111 Nev. 328, 890 P.2d 792 (1995).

Moran's reliance on various Eighth Judicial District Court Rules is irrelevant as such rules are inapplicable. AOB at 21. Regarding Moran's reliance on Eighth Judicial District Court Rule ("EDCR") 7.30(b)(1)-(5), the State's Motion was not based upon an unavailable witness. Regarding Moran's reliance on EDCR 3.60, the State's Motion was not an "[e]x parte motions to shorten time." Additionally, EDCR 7.30(c) specifically states, "[e]xcept in criminal matters," and therefore, it is inapplicable.

Nonetheless, even if Moran *could* show that the State failed to comply with procedural requirements, he cannot show an abuse of discretion because the district

court correctly found good cause. See Sparks v. State, 96 Nev. 26, 28, 604 P.2d 802, 804 (1980) ("[The failure to file a motion and supporting affidavits] will rarely be the basis for finding an abuse of discretion where the trial court has determined good cause exists for granting a continuance."). Moran's contention that district court failed to address the Motion's merits is belied by the record. The district court entertained argument from both parties regarding good cause on October 3, 2014. 5 AA 1206; 6 AA 1268-79. Moran's contention that "[t]he State did not demonstrate good cause for its requested continuance," AOB at 22, is without merit as the State adequately presented the district court with sufficient cause to postpone the trial: (1) "[t]he autopsy report has not been completed . . . because the victim's brain was sent to Stanford University for testing," and thus, the "victim's cause of death" had not yet been determined; (2) "DNA testing has been submitted to the Las Vegas Metropolitan Police Department's Forensic Laboratory, and that testing has also not been completed and no reports prepared; and (3) "tool mark analysis on the victim's body to determine the instrument used to inflict the victim's injuries . . . also has not been completed and no reports have been prepared." 2 AA 396.

Such assertions constitute good cause. Each reason concerned the gathering of further scientific evidence. This Court has found that where the purpose of a continuance is to procure important witnesses and the delay is not the *particular* fault of counsel or the parties, it constitutes an abuse of discretion *not* to grant a

continuance. Lord v. State, 107 Nev. 28, 42, 806 P.2d 548, 557 (1991). The State's need for further evidence-gathering was not its particular fault, and it was tantamount in importance to procuring important witnesses.

This Court has approved of granting a continuance to facilitate DNA testing in Meegan v. State, 114 Nev. 1150, 1153-54, 968 P.2d 292, 294 (1998), opinion modified on other grounds, 1999 Nev. LEXIS 5 (1999). There, unlike here, the defendant's *statutory speedy trial right* was at stake, making the need for prompt commencement of trial greater. Id. Yet, this Court found that the continuance request was supported by good cause, as the purpose for the continuance was to obtain crucial DNA results not yet complete. Id. Similarly here, there was good cause and the district court correctly granted the State's reasonable request in order for it to procure important scientific evidence.

Other courts have found that reasonable delays associated with scientific testing are permissible. See, e.g., United States v. Drapeau, 978 F.2d 1072 (8th Cir. 1992) (eight-week continuance for completion of DNA testing is permissible despite federal speedy trial limits because the purpose for the delay satisfies the "ends of justice" exception to the speedy trial provision); Lazcano v. State, 836 S.W.2d 654 (Tex. App. 1992) (five-month continuance for DNA testing permissible); State v. Green, 252 Kan. 548, 847 P.2d 1208 (1993) (thirty-day continuance to determine whether sample sufficient for testing and ninety-day continuance for actual testing

permissible despite speedy trial limits); Smith v. Deggish, 248 Kan. 217, 807 P.2d 144 (1991) (two continuances totaling over one hundred thirty days for DNA testing permissible despite speedy trial limits even though first continuance requested and granted on eve of original trial date); Flora v. State, 925 So. 2d 797, 817 (Miss. 2006) (need to secure DNA testing, weapons analysis, and a key witness was good cause for delay). Each of these cases are instructive and show that the State did indeed present good cause for its continuance request.

Lastly, Moran's allegation that he "was prejudiced by the continuance," is unavailing. AOB at 22. In fact, he was able to use the results of the toolmark analysis and DNA testing to his advantage during trial, as he argued that "Moran's DNA was not found in the apartment," that "no weapon was found," and that "[i]t was never even determined what it was." 11 AA 1274.

Regarding Moran's claim that he was prejudiced by the State's subsequent filing of a Motion to Admit Evidence of Other Bad Acts and the noticing of a "call phone expert," AOB at 22, these claims are without merit, are unrelated to the reasons for the continuance motion, and are addressed in detail *infra*. To the extent that Moran complains that the State failed to present sufficient evidence to convict Moran of the charged crimes or that prior bad acts evidence was admitted in error, they are also irrelevant to this issue, and these claims are addressed *infra*. AOB at 23.

Therefore, the district court did not err in granting the State's Motion to Continue Jury Trial.

2. The district court did not err in admitting prior bad act evidence.

On December 15, 2014, the State filed a Motion in Limine to Admit Evidence of Other Bad Acts Pursuant to NRS 48.045 and Evidence of Domestic Violence Pursuant to NRS 48.061. 2 AA 468-89. The State sought to admit evidence that on January 23, 2014, Moran showed up at Iris' residence, came up behind Iris, grabbed her by her shoulder with his hands, and shoved her. 2 AA 473. Additionally, when one of their children attempted to intervene, Moran grabbed the child by her shoulders. Id. Also, the State sought to admit that in February 2014, Moran approached the window of Iris' vehicle and, after an argument, became enraged. 2 AA 473-74. Subsequently, Moran arrived at Iris' residence, pushed her into a room, locked the door, and prevented her from leaving by grabbing and twisting her arm. 2 AA 474. During the incident, Moran told Iris "green means you're fine, yellow mean's you're almost dead and then red means you're dead." 6 AA 1323.

A Petrocelli[7] hearing was held on December 31, 2014. 6 AA 1283. On January 6, 2015, the district court found that the evidence of Moran's "prior bad acts is relevant . . . because it shows the escalating behavior between [Moran] and the victim

[7] Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985).

prior to their divorce and the murder," that the "evidence shows the ill will [Moran] bore toward the victim," that "the evidence of these bad acts is admissible to show [Moran]'s motive and intent . . . to kill Iris," and that "the probative value of these acts is not substantially outweighed by their prejudicial effect." 4 AA 937-38. Moran contends that the district court erred in finding such evidence admissible. AOB at 26. However, this contention is without merit.

This Court reviews a trial court's determination regarding the admissibility of prior bad act evidence for an abuse of discretion. Crawford v. State, 107 Nev. 345, 348, 8111 P.2d 67, 69 (1991). "The decision to admit such evidence rests with the sound discretion of the trial court and will not be disturbed on appeal absent a showing that the ruling was manifestly wrong." Kelly v. State, 108 Nev. 545, 548, 837 P.2d 416, 419 (1992).

While evidence of prior crimes may not be used to argue a defendant possesses a criminal propensity, such evidence may be admitted for other purposes:

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

NRS 48.045(2). This Court has clarified that prior acts evidence may be admitted for purposes other than those specified in NRS 48.045(2). Bigpond v. State, 128 Nev. __, __, 270 P.3d 1244, 1249 (2012). "[E]vidence of 'other crimes, wrongs or

acts' may be admitted for any relevant nonpropensity purpose." Id. "[Prior-bad-act evidence] is admissible only when the trial court determines that (1) the evidence is relevant to the crime charged, (2) the act is proven by clear and convincing evidence, and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice." Id. (*citing* Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997)).

Further, "evidence of domestic violence and expert testimony concerning the effect of domestic violence, including, without limitation, the effect of physical, emotional or mental abuse, on the beliefs, behavior and perception of the alleged victim of the domestic violence . . . is admissible in a criminal proceeding for any relevant purpose." NRS 48.061.

Further, the admission of prior bad act evidence is subject to harmless error review. Newman v. State, 129 Nev. __, __, 298 P.3d 1171, 1182 (2013). A nonconstitutional error, such as the allegedly erroneous admission of evidence at issue here, is deemed harmless unless it had a "'substantial and injurious effect or influence in determining the jury's verdict.'" Tavares v. State, 117 Nev. 725, 732, 30 P.3d 1128, 1132 (2001).

A. Moran's prior acts were relevant.

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more

or less probable. NRS 48.015. Moran's prior bad acts evidence is relevant because it demonstrates Moran's motive, intent, plan to kill Iris, pattern of abuse, and identity. Each of these purposes fall within a specifically enumerated use in NRS 48.045(2).

Additionally, as in Bigpond, where the evidence was admissible for the purpose of providing insight into the relationship and explaining the victim's recantation, the evidence here provides a much-needed insight into the troubled relationship between Moran and Iris, giving context to the facts and circumstances of Iris' murder and explaining Moran's motivations for killing her. Bigpond, 128 Nev. at __, 270 P.3d at 1250. Such evidence of domestic violence, relevant for non-propensity purposes, is also admissible under NRS 48.061.

The evidence of Moran's prior bad acts demonstrates the escalating behavior between Moran and Iris prior to their divorce and the murder. Initially non-violent arguments led to divorce, which resulted in Moran going to Texas and Iris beginning to date other men. 6 AA 1344. At the Petrocelli hearing, Sarai's (the daughter of Iris and Moran) testimony established that Moran's and Iris' arguments began to have physical elements with Moran making threats of violence and death. Such evidence demonstrated Moran's ill will toward Iris, proving motive, intent, and pattern. Rimer v. State, 131 Nev. __, __, 351 P.3d 697, 709 (2015) (evidence of past acts of child abuse were relevant for non-propensity purposes in a child abuse prosecution to

establish "a pattern of abuse and neglect"); Ledbetter v. State, 122 Nev. 252, 262, 129 P.3d 671, 678 (2006) ("It . . . remains the law in Nevada that 'whatever might 'motivate' one to commit a criminal act is legally admissible to prove 'motive' under NRS 48.045(2).").

As to identity, although Moran was identified as the 9-1-1 caller, no witness directly viewed Moran beat Iris to death.[8] Therefore, the fact that Moran's violence against Iris escalated and he made threats against her, is extremely probative and relevant to establishing that Moran was the person who beat Iris to death. As to intent, the evidence is relevant as it makes it more likely that Moran lied in wait and

[8] Indeed, at trial, Moran argued:

> How do we even know it was Mr. Moran who was in the apartment? We don't have any independent evidence, there's no eye witnesses, there's no DNA, there's no fingerprints, there's no blood stains. There's nothing that would allow you to assume that it's him, other than the fact that he is the most obvious guy. He's the easy target. He's the ex-husband who wanted his wife back, who didn't want a divorce. [The State] need[s] more than that.

11 AA 2483-84. Accordingly, identity was at issue and Moran's unique motive to kill Iris clearly tended to establish that Moran was her killer. See Mortensen v. State, 115 Nev. 273, 280, 986 P.2d 1105, 1110 (1999) ("[T]he identity exception to NRS 48.045(2) generally involves situations where a positive identification of the perpetrator has not been made, and the offered evidence establishes a signature crime - so clear as to establish the identity of the person on trial.").

repeatedly battered Iris with the intent to murder her. The evidence further establishes premeditation and deliberation.

B. Moran's prior acts were established by clear and convincing evidence.

At the evidentiary hearing, Sarai testified as a direct witness to Moran's prior bad acts and was subjected to cross-examination. 6 AA 1313-44. "[A] district court's factual findings will be given deference by this court on appeal, so long as they are supported by substantial evidence and are not clearly wrong." Lader v. Warden, 121 Nev. 682, 686, 120 P.3d 1164 (2005). Based on Sarai's testimony, as outlined *supra*, the district court was not clearly wrong in finding the prior-bad-act had been proven by clear and convincing evidence.

C. The probative value of the prior bad acts is not substantially outweighed by the danger of unfair prejudice.

The evidence is not more prejudicial than probative because: (1) the facts surrounding the prior instances of Moran's violence are similar to the ones present in this case; (2) the incidents are not remote in time from Iris' murder; and, (3) the facts surrounding the prior instances of violence are far less egregious than those of Iris' brutal murder. Instead, the evidence was highly probative in establishing that Moran killed Iris with malice aforethought. The prior events of domestic violence were clearly overshadowed by the direct details of Moran's murder of Iris, but closely intertwined to his motivation, intent, and identity as Iris' killer.

Accordingly, the district court correctly found that each of the Tinch factors had been established and Moran fails to establish error.

D. Harmless error.

Even if a trial court errs by admitting evidence of the defendant's prior bad acts, such error does not warrant reversal if the error was harmless. Newman, 129 Nev. at __, 298 P.3d at 1182; Fields v. State, 125 Nev. 776, 784, 220 P.3d 724, 729 (2009). Even if admission of Moran's previous acts of physical aggression was error, it was harmless. The testimony regarding Moran's prior violence cannot be said to have had a substantial and injurious effect on the verdict in light of the overwhelming evidence against Moran and the depravity of Iris' murder.

E. Evidence of Moran's gambling problem did not constitute prior-bad-act evidence under NRS 48.045(2) because it did not constitute evidence of a chargeable criminal offense

Moran contends that the State's cross-examination of him about financial problems stemming from gambling constituted prior-bad-act evidence. AOB at 29-30; 11 AA 2377-78. However, such evidence did not constitute prior-bad-acts because gambling is not a crime. It thus could not constitute prior-bad-act evidence. Evidence is not a prior bad act unless the evidence speaks to chargeable collateral offenses. See Salgado v. State, 114 Nev. 1039, 1042-43, 968 P.2d 324, 326-27 (1998) (explaining that cases in which the evidence does not implicate prior bad acts or collateral offense on the defendant's part, a Petrocelli hearing is not required);

Colon v. State, 113 Nev. 484, 494, 938 P.2d 714, 720 (1997) (Petrocelli hearing not required when State elicited testimony that defendant knew where marijuana was grown in her building, associated with drug dealers and bailed known drug user out of jail). Moran's citation to a federal case is inapposite and contravenes the mandatory authority of the Nevada Supreme Court. See Blanton v. North Las Vegas Mun. Ct., 103 Nev. 623, 633, 748 P.2d 494, 500 (1987) (decisions of federal courts not binding). Accordingly, the evidence was not a collateral offense and could not be excluded under NRS 48.045(2).

Even if gambling was prior-bad-act evidence, a district court's failure to conduct a Petrocelli hearing prior to the admission of bad acts testimony does not require reversal if: "(1) the record is sufficient to determine that the evidence is admissible under [the modified standard set forth in Bigpond]; or (2) the result would have been the same if the trial court had not admitted the evidence." McNelton v. State, 115 Nev. 396, 405, 990 P.2d 1263, 1269 (1999). The evidence had a clear non-propensity purpose—to show motivation by Moran to kill Iris out of ill-will and disdain for prohibiting him from gambling. It was proven by clear and convincing evidence because Moran *admitted* to financial problems caused by gambling. 11 AA 2376-79. And the evidence was not unduly prejudicial because it had probative value in establishing motive, and was not inflammatory, violent, or fraudulent in nature. Thus, each Tinch factor would have been satisfied were a Petrocelli hearing held.

Further, the result of the trial would have remained the same even if the evidence was not admitted. The overwhelming evidence against Moran, as discussed *supra* within the Statement of Facts, clearly shows that this passing reference to gambling had no impact on the verdict.

Even if the evidence was erroneously admitted, Moran cannot show a substantial or injurious effect or influence on the jury's verdict from any error in admission of the evidence. Knipes v. State, 124 Nev. 927, 935, 192 P.3d 1178, 1183 (2008). The jury was instructed on the limited use of prior bad act evidence. 10 AA 2238. Jurors are presumed to follow their instructions. Leonard v. State, 117 Nev. 53, 66, 17 P.3d 397, 405 (2001). Further, the overwhelming evidence as laid out *supra* demonstrates the lack of any prejudice.

Accordingly, Moran fails to demonstrate error warranting reversal.

3. The district court did not err in allowing Zachary Johnson to testify.

On December 26, 2014, Moran filed a Motion to Strike State's Expert Witnesses. 4 AA 779-83. On December 31, 2014, the State filed an Opposition. 4 AA 808-12. Ultimately, the district court denied Moran's Motion. 5 AA 1213; 9 AA 1846. Moran asserts that this was in error. AOB at 31.

A party that intends to call an expert witness during its case in chief shall file and serve upon the opposing party, not less than 21 days before trial *or at such other time as the court directs*, a written notice containing a copy of all reports made by

or at the direction of the expert witness. NRS 174.234(2)(c) (emphasis added). Further, a district court's decision whether to allow an unendorsed witness to testify is reviewed for abuse of discretion. Mitchell v. State, 124 Nev. 807, 819, 192 P.3d 721, 729 (2008). Jones v. State, 113 Nev. 454, 471, 937 P.2d 55, 66 (1997), gives the standard of review of a district court's actions following the State's offer of an unendorsed witness:

> This court "will not find an abuse of discretion in such circumstances unless there is a showing that the State has acted in bad faith, or that the non-disclosure results in substantial prejudice to appellant."

Id. (quoting Langford v. State, 95 Nev. 631, 635, 600 P.2d 231, 234 (1979)). Jones also noted that "failure to endorse a witness constitutes reversible error only where the defendant has been prejudiced by the omission." Id. at 473, 937 P.2d at 67.

In Burnside v. State, 131 Nev. ___, ___, 352 P.3d 627, 637 (2015), this Court noted that an appellant's failure to explain what he would have done differently had proper notice been given, or request a continuance renders a failure to provide notice harmless. A failure to show how a more thorough investigation or preparation would have made any difference in the case also renders a lack of notice harmless. Grey v. State, 124 Nev. 110, 120, 178 P.3d 154, 161 (2008).

A. Moran's allegation of "bad faith" was not raised below and is waived.

The district court is only required to preclude the testimony of an unendorsed witness when done in bad faith. Jones, 113 Nev. at 471, 937 P.2d at 66. However,

Moran's rhetoric below did not amount to a "bad faith" argument. Accordingly, Moran is raising this claim for the first time on appeal. Therefore, this claim is waived and the Court should not address it. Dermody v. City of Reno, 113 Nev. 207, 210-11, 931 P.2d 1354, 1357 (1997); Guy v. State, 108 Nev. 770, 780 839 P.2d 578, 584 (1992), cert. denied, 507 U.S. 1009, 113 S. Ct. 1656 (1993); Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991). If the Court wishes to address bad faith, the only remedy is a remand for creation of a record on this issue. Ryan's Express v. Amador Stage Lines, 128 Nev. ___, 279 P.3d 166, 172 (2012).

B. The State did not act in bad faith.

Nonetheless, review of the record indicates that the State did not act in bad faith when it presented, without endorsement, Zachary Johnson as an expert witness. Moran's assertion that "the State's failure to provide any reports or data at the time it filed its expert notice was a calculated ploy," AOB at 25, is entirely without merit.

The State was not in receipt of a report from Mr. Johnson until Friday, December 26, 2014. 4 AA 810. On that date, instead of receiving the report by mail, the prosecutor assigned to this case drove to Mr. Johnson to retrieve the report. Id. Once in possession of Mr. Johnson's report, the State contacted trial counsel and offered to provide it immediately. Id.; 6 AA 1305. Trial counsel indicated that it could wait until Monday, December 29, 2014. 4 AA 810. On that date, the report was provided to Moran. Id. Additionally, the State explained that it was "still in the

process of copying the CD containing the cell phone data," and that the State had determined that "the CD is not able to be copied," and that a request was made to the Las Vegas Metropolitan Police Department "to get an additional copy of the CD." 4 AA 810, n. 1.

The underlying facts of Moran's accusations do not amount to bad faith. Despite Moran's speculative presumptions that "the State knew about the supposed tracking application as early as June 2013," AOB at 34, the State did not know about the tracking application on Iris' phone until witnesses were thoroughly interviewed during pretrial conferences, as such, this discovery was newly discovered evidence. 6 AA 1305. A very real and clear distinction exists between the suspicion that such evidence may exist and the discovery of its actual existence.

Additionally, Moran blends two differing types of evidence related to Iris' cellphone: data held by the service provider, such as "cell location data, subscriber information, numbers that are called, [and] when text messages are made," and the data contained within the cellphone's memory. Id. The service provider data "is the information that the detectives asked for back in June from the cell phone companies," and that the State received in December, which was provided to Moran. Id. The data housed within Iris' cellphone was sought without delay following pretrial conferences with witnesses which led the State to concretely believe that Moran was tracking Iris using an application installed onto her cellphone. 6 AA

1304-05. This newly discovered evidence was received on December 26, 2014, and was made immediately available to Moran. 6 AA 1305.

Regarding Moran's contention that "the cell phone data the State provided was over eight (8) gigabytes," AOB at 32, the State informed the district court that the information required approximately two hours to thoroughly review as the information was divided into "text messages, photos, audio recordings, etc." 6 AA 1305. "Although it's 8 gigabytes of data, that's because every single application and program is on that disc, including all of the downloaded operating systems, as well as the application itself. So it's not as though counsel has to go byte, by byte, by byte through this report." 6 AA 1305-06.

This demonstrates that the State did not act in bad faith, and instead acted expeditiously when it knew that Johnson's testimony would be offered at trial.

C. Moran fails to establish prejudice

Moran is unable to demonstrate prejudice. See Evans v. State, 117 Nev. 609, 638, 28 P.3d 498, 518 (2001), overruled in part on other grounds by Lisle v. State, 131 Nev. ___, 351 P.3d 725 (2015) (district court has broad discretion in fashioning a remedy and it does not abuse its discretion absent a showing that the State acted in bad faith or that the nondisclosure caused substantial prejudice to the defendant). First, Moran did not seek a continuance, and, in fact, fervently argued against such a remedy. 4 AA 1845. Accordingly, he cannot show prejudice because a remedy was

offered to him, and he refused it. As such, this case presents an even stronger instance of a lack of prejudice than in Burnside, 131 Nev. at ___, 352 P.3d at 637.

Further, Moran does not explain what he would have done differently had proper notice been given, or that a more thorough investigation or preparation would have made any difference in the case, rendering any lack of notice harmless. Grey, 124 Nev. at 120, 178 P.3d at 161.

Additionally, Johnson's testimony was limited to the fact that the "Letmespy" application was installed on Iris' phone on March 11, 2014, what it was capable of, and that it was hidden from the user and not related to the substance of the "eight gigabytes" of data that Moran now complains about. 9 AA 1867-74. Accordingly, Moran's naked assertions of prejudice are insufficient to warrant relief. Moran was provided the opportunity to acquire an expert witness and was able to cross-examine Johnson, and, in fact, did so thoroughly, belying any claim that he was prejudiced by a lack of notice. 4 AA 1874-79.

Because the State acted diligently and not in bad faith, the district court did not abuse its discretion is allowing Johnson's limited testimony. Additionally, because a jury convicted Moran in light of overwhelming evidence, any error was widely overshadowed and there was no substantial and injurious effect or influence in determining the jury's verdict. Knipes, 124 Nev. at 935, 192 P.3d at 1183.

4. Barral does not warrant reversal.

Citing Barral,[9] Moran complains that "the district court failed to administer the juror oath to the venire prior to jury selection." AOB at 37. It is the State's position that Barral is wrong and should be overruled. Further, this claim is waived because Moran failed to request that prospective jurors be sworn. 1 AA 23-103. Moran concedes that he "did not object or make a record regarding the court's failure to administer the oath." AOB at 37. "The 'failure to specifically object on the grounds urged on appeal preclude[s] appellate consideration on the grounds not raised below.'" Thomas v. Hardwick, 126 Nev. __, __, 231 P.3d 1111, 1120 (2010). Regardless of whether error is structural, plain error review applies. Puckett v. United States, 556 U.S. 129, 140, 129 S. Ct. 1423, 1432 (2009) (reserving whether "structural errors" automatically satisfy plain error); United States v. Kieffer, 681 F.3d 1143, 1158 (10th Cir. 2012) ("[a] defendant failing to object to structural error in the district court likely would still need to establish that an error was plain and seriously affected the fairness, integrity, or public reputation of the judicial proceedings").

Had this allegation been preserved, reversal is still unwarranted because Barral is incorrect. Barral held "that a district court commits structural error when it

[9] Barral v State, 131 Nev. __, __, 353 P.3d 1197 (2015).

fails to administer the oath to potential jurors pursuant to NRS 16.030(5)." Barral, 131 Nev. at __, 353 P.3d at 1197. Voir dire protects the right to an impartial jury. Truthful answers by prospective jurors are necessary if this process is to serve its purpose. However, when the voir dire process deprives a party of information which he should have received, it is "contrary to the practical necessities of judicial management" to automatically grant a new trial absent a showing of prejudice:

> [T]o obtain a new trial in such a situation, a party must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause. The motives for concealing information may vary, but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial.

McDonough Power Equip. v. Greenwood, 464 U.S. 548, 556, 104 S.Ct. 845, 850 (1984). The Court further reasoned that "the harmless-error rules adopted by this Court and Congress embody the principle that courts should exercise judgment in preference to the automatic reversal for 'error' and ignore errors that do not affect the essential fairness of the trial." Id., 464 U.S. at 553. "We have come a long way from the time when all trial error was presumed prejudicial. . . ." Id.

Nevada has adopted this reasoning by holding that to justify a new trial, a juror's failure to reveal a prior arrest during voir dire examination "must be prejudicial, that is, it must have improperly influenced the jury or tainted its verdict." Hale v. Riverboat Casino, 100 Nev. 299, 304-5, 682 P.2d 190, 193 (1984). A prospective juror concealing victimization is reviewable for harmless error. Canada

v. State, 113 Nev. 938, 941, 944 P.2d 781, 783 (1997). This Court is required to apply harmless error standards "without regard to technical error or defect which does not affect the substantial rights of the parties." NRS 177.255; NRS 178.598 ("any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded").

If a juror's actual dishonesty in answering voir dire questions is not per se structural error, then it necessarily follows that the failure to administer a truthfulness oath to prospective jurors, is likewise not structural error. State v. Vogh, 179 Ore.App. 585, 596, 41 P.3d 421, 428 (Or.App. 2002) ("We can conceive of no reason to treat a failure to administer the oath to the jury as more fundamental in nature – and thus, 'structural' – than the juror's actual performance of their duties in conformance with that oath, or the jurors' eligibility or competence to be jurors"). In either situation, the error is deemed harmless absent a showing of prejudice, namely that "a correct response would have provided a valid basis for a challenge for cause." McDonough, *supra*. In other words, reversal is only warranted if a seated juror was actually biased.

This same analysis applies when a peremptory challenge is used to remove a juror who should have been excused for cause. Ross v. Oklahoma, 487 U.S. 81, 83-88, 108 S.Ct. 2273, 2275-78 (1988). If a party exercises a peremptory challenge to remove a biased juror then the error is not reversible absent a showing that the seated

juror was not impartial. Id. The Court rejected structural error. Id. Acknowledging that the erroneous denial of a cause challenge may result in a different composition of jurors, the Court held that this "possibility" of prejudice did not mandate reversal. Id.

Nevada has relied upon Ross and held that voir dire errors do not result in the denial of the right to a fair and impartial jury so long as the jury that sits is impartial. Antiga-Morales v. State, 130 Nev. ___, 335 P.3d 179 (2014) (denying defense access to juror background information developed by prosecution not prejudicial absent the seating of an impartial juror); Blake v. State, 121 Nev. 779, 796, 121 P.3d 567, 578 (2005) (erroneous denial of challenge for cause cured by exercise of peremptory); Weber v. State, 121 Nev. 554, 581, 119 P.3d 107, 125-126 (2005) (erroneous denial of cause challenge required showing of prejudice).

This Court has declined to find structural error in other contexts involving voir dire and an impartial jury. Failure to instruct a jury to restart deliberations when an alternate juror is seated is an error of constitutional dimension, but is not structural error. Martinorellan v. State, 131 Nev. ___, __, 343 P.3d 590, 593 (2015). Off the record bench conferences to determine the admissibility of juror questions is subject to harmless-error review. Knipes, 124 Nev. at 934, 192 P.3d at 1183. Bringing a lone dissenting juror into chambers and inquiring whether the juror heard the evidence

and was willing to follow the instructions, was not structural error. Eden v. State, 109 Nev. 929, 932, 860 P.2d 169, 170 (1993).

The purpose of the voir dire oath is to ensure truthful answers. This statutory process is no different in its purpose of ensuring an impartial jury than the other procedural violations above, all of which are amenable to harmless error analysis. Barral erroneously singled out the voir dire oath as constituting structural error without distinguishing these other errors which are reviewed for harmlessness.

For an error to be structural, it must be a fundamental constitutional error. Knipes, 124 Nev. at 934, 192 P.3d at 1182-83. But the statutory requirement for a voir dire oath is not found in the Nevada Constitution. Indeed, the version of the statute prior to 1977 had no such requirement. NRS 16.030(5); 1977 Statutes of Nevada, Page 417-18. It is curious how a relatively modern practice that did not exist in Nevada for the better part of the twentieth century can be deemed of such constitutional magnitude that its absence strikes at the very framework of the trial. Given the vast number of trials that have proceeded and verdicts rendered without the aid of a voir dire oath in years past, the implications of now deeming such error as structural is astounding.

The Constitution does not dictate the use of a voir dire oath as a necessary and essential means by which an impartial jury is selected. Morgan v. Illinois, 504 U.S. 719, 729, 112 S. Ct. 2222, 2229 (1992). No hard-and-fast formula dictates the

necessary depth or breadth of voir dire. Skilling v. United States, 561 U.S. 358, 385-86, 130 S. Ct. 2896, 2917 (2010). Instead, the jury selection process is "particularly within the province of the trial judge." Ristaino v. Ross, 424 U.S. 589, 594-5, 96 S. Ct. 1017, 1020 (1976); Mu'Min v. Virginia, 500 U.S. 415, 424, 111 S. Ct. 1899, 1905 (1991).

Barral misapplies the authority it relies upon since the supporting precedents were founded upon a constitutional violation not present in the failure to administer a voir dire oath. See e.g., Peters v. Kiff, 407 U.S. 493, 497-98, 92 S. Ct. 2163, 2165-66 (1972) (systematic exclusion of African-Americans from jury violates the Constitution). Absent such a constitutional violation, the appearance of bias and probability of prejudice alone do not constitute structural error. The Supreme Court has rejected such an interpretation of its precedent. Skilling, *supra*, 561 U.S. at 380 ("our decisions, however, [ie., Estes v. Texas] 'cannot be made to stand for the proposition that juror exposure to . . . news accounts of the crime . . . alone presumptively deprives the defendant of due process.' ").

Federal courts have affirmed that the failure to give an oath prior to voir dire does not implicate federal constitutional rights. Lucero v. Holland, 2014 U.S.Dist. LEXIS 171749, 63 (E.D.Cal. Dec. 10, 2014); Carter v. Chappell, 2013 U.S.Dist. LEXIS 37838, 142-146, 2013 WL 781910 (C.D. Cal. Mar. 1, 2013); Robertson v.

McKee, 2012 U.S. Dist. LEXIS 10715, 2012 WL 263099, at 4 (E.D. Mich. Jan. 30, 2012).

Even the oath given to the petit jury at the start of trial is not necessarily required. United States v. Turrietta, 696 F.3d 972 (10th Cir. 2012) ("we are aware of no binding authority, whether in the form of a constitutional provision, statute, rule or judicial decision, addressing whether the Sixth Amendment right to trial by jury necessarily requires the jury be sworn"). The question whether the oath to fairly render a verdict is required in federal courts is questionable. 47 Am.Jur. 2d Jury § 192 (2011); United States v. Pinero, 948 F.2d 698, 700 (11th Cir. 1991) ("[I]t is not clear from the case law whether juries in the federal system are required to be sworn in."). Turrietta proclaimed:

> No federal court … has held the constitutional guarantee of trial by jury to necessarily include trial by sworn jury. While courts routinely recognize the jury oath as standard practice in federal trials, only a handful have suggested the failure to duly swear the jury would amount to error.

Turrietta, 696 F.3d at 982. If the jury oath to faithfully deliberate is not constitutionally required, how less so is the pre-trial voir dire oath to answer questions truthfully.

Even if the voir dire oath is somehow constitutionally required, automatic reversal is strong medicine that should be reserved for constitutional errors that *always or necessarily* produce unfairness. A structural error always requires reversal

because it "*necessarily* render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." Neder v. United States, 527 U.S. 1, 9, 119 S. Ct. 1827 (1999). Structural errors "are the exception and not the rule." Hedgepeth v. Pulido, 555 U.S. 57, 61, 129 S. Ct. 530, 532 (2008). "If the defendant had counsel and was tried by an impartial adjudicator, there is a *strong presumption* that any other errors that may have occurred" are not "structural errors." Rose v. Clark, 478 U.S. 570, 579, 106 S. Ct. 3101 (1986).

"Always" and "necessarily" appear nowhere in Barral's structural error analysis nor does Barral address the presumption against structural error. Instead, Barral finds structural errors because of the "probability" or "likelihood" of prejudice and the "appearance" of bias. However, absent a constitutional violation, such uncertainty regarding prejudice does not equate with structural error. The omission of a voir dire oath does not "always" or "necessarily" result in an unfair trial or biased jury. At most, the error increases the risk that a prospective juror might be less truthful. Because of the courtroom setting, presence of the judge, and solemnity of the occasion, prospective jurors feel obliged to be honest in voir dire answers even without taking an oath. Honesty is a matter of personal integrity and is not always enhanced because a formalistic oath is administered.

Other jurisdictions agree that the omission of a voir dire oath is not structural error. People v. Stover, 2011 Mich.App. LEXIS 644, 5-7, 2011 WL 1377084

(Mich.Ct.App. Feb 12, 2011); People v. Carter, 36 Cal.4th 1114, 1176-77, 117 P.3d 476, 518-19 (2005); State v. Vogh, 179 Ore. App. 585, 598, 41 P.3d 421, 429 (Ore.Ct.App. 2002); State v. McNeill, 349 N.C. 634, 509 S.E.2d 415 (1998); Gober v. State, 247 Ga. 652, 655, 278 S.E.2d 386, 389 (Ga. 1981); State v. Glaros, 170 Ohio St. 471, 166 N.E.2d 379 (1960); State v. Tharp, 42 Wn.2d 494, 499-500, 256 P.2d 482, 486-87 (Wash. 1953). As such, structural error should not apply when a district court does not give a voir dire oath.

Even if structural error applied and this Court finds Moran did not waive it, this Court should review his claim for plain error because Moran did not object to it below. Mendoza-Lobos v. State, 125 Nev. 634, 644, 218 P.3d 501, 507 (2009). Under the plain error standard, Moran must show that the error was plain from the record and that "the error affected his ... substantial rights, by causing actual prejudice or a miscarriage of justice." Id. Based on the overwhelming evidence, as discussed *infra*, Moran cannot show that he suffered actual prejudice or a miscarriage of justice.

5. The district court properly instructed the jury.

A. Instruction 22.

Moran alleges that "the court's decision to give instruction 22 was an abuse of discretion," instead of Moran's proposed "Instruction I." AOB at 40-41. However, this contention is without merit. District courts' decisions settling jury instructions

are reviewed for an abuse of discretion. Crawford v. State, 121 Nev. 746, 748, 121 P.3d 582, 585 (2003). District courts have wide discretion to settle jury instructions. Rose v. State, 123 Nev. 194, 204-05, 163 P.3d 408, 415 (2007). "It is not error for a court to refuse an instruction when the law in that instruction is adequately covered by another instruction given to the jury." Id. (quoting Doleman v. State, 107 Nev. 409, 416, 812 P.2d 1287, 1291 (1991)). Though a defendant is entitled to an instruction on his theory of defense so long as there is any evidence to support it, he is not entitled to demand a specific wording of an instruction. Crawford, 121 Nev. at 754, 121 P.3d at 589. Further, instructional errors are harmless when it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error," and the error is not the type that would undermine certainty in the verdict. Wegner v. State, 116 Nev. 1149, 1155–56, 14 P.3d 25, 30 (2000) overruled on other grounds, Rosas v. State, 122 Nev. 1258, 147 P.3d 1101 (2006); See also, NRS 178.598.

Moran's "Proposed Instruction I," stated:

> In order for you to find the Defendant guilty of both kidnapping and an associated offense of murder, you must find beyond a reasonable doubt that any seizure, restraint, or movement of the deceased substantially exceeded that required to complete the murder.
>
> The seizure, restraint, or movement of the deceased must stand alone with independent significance from the act of murder itself. It cannot be incidental to the completion of the murder.

> If you do not find beyond a reasonable doubt that the seizure, restraint, or movement of the deceased substantially exceeded that required to complete the murder, then you must find the defendant Not Guilty of kidnapping.

5 AA 1126. At trial, the district court provided the following instruction to the jury:

> In order for you to find the defendant guilty of both first-degree kidnapping and an associated offense of murder, you must also find beyond a reasonable doubt either:
>
> (1) That any movement of the victim was not incidental to the murder;
> (2) That any incidental movement of the victim substantially exceeded that required to complete the murder; or
> (3) That the victim was physically restrained;
>
> "Physically restrained" includes but is not limited to tying, binding, or taping.

5 AA 1161.

Moran complains that the district court abused its discretion because it "instructed that physical restraint, standing alone, is sufficient to support dual liability for both murder and kidnapping." AOB at 40. However, this contention is belied by the explicit language of the district court's instruction. Claims must be supported with specific factual allegations, which if true, would entitle the defendant to relief and claims belied by the record are insufficient to warrant relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

Further, Instruction 22 is a correct and accurate statement of the law. In Mendoza v. State, 122 Nev. 267, 275, 130 P.3d 176, 181 (2006), the Nevada Supreme Court clearly stated the test for dual culpability:

> To sustain convictions for both robbery and kidnapping arising from the same course of conduct, any movement or restraint must stand alone with independent significance from the act of robbery itself, create a risk of danger to the victim substantially exceeding that necessarily present in the crime of robbery, or involve movement, seizure or restraint substantially in excess of that necessary to its completion.

See also Pascua v. State, 122 Nev. 1001, 1004-06, 145 P.3d 1031, 1033-34 (2006) (applying this analysis in a murder-kidnapping context). Here, Instruction 22 instructed jurors that they "must *also* find . . . ," 5 AA 1161, and largely tracks the statutory elements. Further, the jury unanimously found that Iris' murder was willful, deliberate, and premeditated, and that the murder was committed during the perpetration of a kidnapping and a burglary. 5 AA 1185. Additionally, the jury was properly instructed on the different theories of murder liability, the elements of burglary, kidnapping, and murder, the "Felony-Murder" rule, dual convictions under theories of kidnapping and murder, and the State's burden of proof. 5 AA 1141-42, 44-61, 73. Furthermore, Moran specifically argued Instruction 22 to the jury and the necessity for the State to prove a "greater risk of harm," as well as dual convictions, the facts in the context of the elements of a kidnapping and murder charge and the State's burden of proof. 11 AA 2469-81. Thus, any error was harmless. Therefore, Moran fails to demonstrate that the district court did not abuse its discretion.

B. Moran's proposed "Instruction D."

Regarding Moran's contention that the district court abused its discretion in not providing the jury with a "two reasonable interpretations" instruction, AOB at

42-44, such a contention is without merit as it is not error to refuse this kind of instruction where the jury has been properly instructed on the standard of reasonable doubt. See, e.g., Mason v. State, 118 Nev. 554, 559, 51 P.3d 521, 524 (2002); *Bails v. State*, 92 Nev. 95, 96-98, 545 P.2d 1155, 1155-56 (1976). Moreover, defendants are not "entitled to instructions that are misleading, inaccurate, or duplicitous," Crawford, 121 Nev. at 754, 121 P.3d at 589, and when the jury is properly instructed on reasonable doubt, "an additional instruction on the sufficiency of [the] evidence invites confusion." State v. Guthrie, 194 W. Va. 657, 461 S.E.2d 163, 175 (W. Va. 1995). See also Holland v. United States, 348 U.S. 121, 140, 75 S. Ct. 127, 138 (1954); State v. Humpherys, 8 P.3d 652 (Idaho 2000) ("We agree with the conclusion of the courts from the growing majority of states that in all criminal cases there should be only one standard of proof, which is beyond a reasonable doubt. Therefore, we hold that once the jury has been properly instructed on the reasonable doubt standard of proof, the defendant is not entitled to an additional instruction."). It is not error to refuse to give an instruction when the law encompassed therein is substantially covered by other instructions given to the jury. Hooper v. State, 95 Nev. 924, 926, 604 P.2d 115, 116 (1979) (collecting cases).

Moran concedes that the jury was properly instructed on reasonable doubt and therefore, any error was harmless. Thus, Moran fails to demonstrate that the district court did not abuse its discretion.

6. The State did not commit prosecutorial misconduct.

Moran must demonstrate "that the remarks made by the prosecutor were 'patently prejudicial.'" Riker v. State, 111 Nev. 1316, 1328, 905 P.2d 706, 713 (1995) (*citing* Libby v. State, 109 Nev. 905, 911, 859 P.2d 1050, 1054 (1993)). This is because a defendant has a right to a fair trial, not a perfect one. Ross v. State, 106 Nev. 924, 927, 803 P.2d 1104, 1105 (1990). The relevant inquiry is whether the prosecutor's statements so contaminated the proceedings with unfairness as to make the result a denial of due process. Darden v. Wainwright, 477 U.S. 168, 181, 106 S.Ct. 2464, 2471 (1986). Defendant must show that the statements violated a clear and unequivocal rule of law, he was denied a substantial right, and as a result, he was materially prejudiced. Libby, 109 Nev. at 911, 859 P.2d at 1054.

A. "Calling witnesses liars"

Moran claims that "during cross examination the prosecutor repeatedly baited [Moran] into accusing his children of generally lying but also specifically lying at trial." AOB at 46. In support of his claim, Moran references four instances in the record. None demonstrate misconduct.

The first instance involves Moran's testimony about letters that he wrote, wherein he accuses his children of lying:

> MR. ROGAN: You have – you've said some things about your daughter Sarai. You said that she was lying.
> MORAN: Sometimes she was, yes.
> MR. ROGAN: You said that Fernando would also lie.

MORAN: No, not really.
MR. ROGAN: He wouldn't lie?
MORAN: No, he won't.
. . .
MR. ROGAN: All right sir, can you see what's displayed on page, I guess, 2 of the English translation, the last paragraph. You wrote a letter to your mother-in-law Elana: My children also told the police things that are not true with what I am and have been for them because I have not done anything else but take care of them, protect them, love them, and love them so much.
MORAN: Yes.
MR. ROGAN: Are you saying here that your children lied to the police?
MORAN: Well, I can't quite remember. I knew they lie about some – I know they lied about something, but I can't quite remember what it was. I know – I got a package on my bed like 1,000 pages so I would have to go through all of them to remember what I was talking about.
MR. ROGAN: Okay. I'm just asking you whether in this letter you're telling Elana –
MORAN: Yes.
MR. ROGAN: – if your children lied to the police?
MORAN: Yes.
MR. ROGAN: All right. And again, on page 5 of that same letter, halfway down, that paragraph beginning: Before I conclude I read the report again – and what you've done so far at this point is you've read through all of the police reports, and Sarai's statement, and Fernando's statement, and Alan's statement, right?
MORAN: Yes.
MR. ROGAN: Okay. And you say: Before I conclude, I read the report and again, well, yes, Sarai says a whole bunch of lies which I would need to use more paper to prove her wrong.
MORAN: Uh-huh.
MR. ROGAN: And then you say: There's another very big lie my boy Fernadito said that really left me with my mouth open on page 10 of the report.
MORAN: Yes, I do remember that one.
MR. ROGAN: Okay. So your children aren't mistaken in the things they're telling the police? They're – he's – they're actually deliberately telling them things that are not true?
MORAN: Can I tell you what was he –
MR. ROGAN: No. It's yes –

> MORAN: – lying about?
> MR. ROGAN: – no.
> MORAN: Oh.
> MR. ROGAN: Your children are deliberately telling the police things that are not true?
> MORAN: Some of the stuff.
> MR. ROGAN: Some of the stuff?
> MORAN: Yes.

11 AA 2371-73.

This Court considered the propriety of questions asking whether another witness was "lying" in Daniel v. State, 119 Nev. 498, 78 P.3d 890 (2003). It held:

> We adopt a rule prohibiting prosecutors from asking a defendant whether other witnesses have lied or from goading a defendant to accuse other witnesses of lying, except where the defendant during direct examination has directly challenged the truthfulness of those witnesses. Violations of the rule are subject to harmless-error review under NRS 178.598.

Id. at 519, 78 P.3d at 904 (footnote omitted).

Notably, this Court considered but did not adopt a rule prohibiting the State from asking whether witnesses were "mistaken," as the Supreme Court of New Mexico had. Id. at 518-19, 78 P.3d at 903-04 (discussing State v. Flanagan, 111 N.M. 93, 801 P.2d 675, 679 (N.M. Ct. App. 1990)). Subsequently, Pascua, found it proper to ask the defendant questions about the veracity of witnesses, as well as the veracity of defendant, to rebut the defendant's theory of the case, because it was done "in an effort to point out inconsistencies between [the defendant's] version of

what happened and the other witnesses' versions." 122 Nev. at 1007-08, 145 P.3d at 1045.

Moran was questioned regarding these letters and about his children's veracity on direct examination. 11 AA 2351. The prosecutor, during cross examination, simply highlighted the inconsistencies in Moran's testimony. The State's line of questioning, made in response to Defense direct examination, was fair and proper in light of the context. The State had the latitude to confirm and rebut Moran's theory of the case by pointing out the inconsistencies between Moran's testimony and that of the other witnesses. Pascua, 122 Nev. at 1007-08, 145 P.3d at 1045. The State properly elicited the strong divergence between Moran's version of events and that of the other percipient witnesses.

The second instance referenced involves Moran's statements:

> MR. ROGAN: All right. You also talked about Alan – or you heard Alan testify. Remember Alan's testimony?
> MORAN: I think so, yes.
> MR. ROGAN: All right. And he testified that you told him that you followed Iris using a call phone app to a house in North Las Vegas.
> MORAN: North Las Vegas?
> MR. ROGAN: Yes.
> MORAN: That I follow her, no.
> MR. ROGAN: You don't remember Alan testifying about that?
> MORAN: I remember he said that.
> MR. ROGAN: Okay.
> MORAN: No – but I didn't do that.
> MR. ROGAN: You never did that?
> MORAN: No.
> MR. ROGAN: So what Alan testified to is also untrue?

MORAN: Yea, I don't know where he got that from. I didn't – no, I never did that.
MR. ROGAN: And you never told him you did anything like that?
MORAN: No.

11 AA 2385-86. Again, the prosecutor simply sought to present the jury with Moran's inconsistent statements. The State is entitled point out such inconsistencies. Pascua, 122 Nev. at 1007-08, 145 P.3d at 1045.

The third instance, again, involves inconsistencies in Moran's statements:

MR. ROGAN: So you went into her closet?
MORAN: Yeah, to put –
MR. ROGAN: But you heard Sarai testify that the dolls were in her – in Sarai's closet.
MORAN: The what?
MR. ROGAN: The dolls are in Sarai's closet.
MORAN: The dolls? The baby dolls?
MR. ROGAN: The baby dolls. You heard her testify about her dolls that were in the closet next to where she put the key. Are you sure you were in –
MORAN: No, the baby dolls were in my wife's closet.
MR. ROGAN: Okay. So Sarai's – Sarai is not accurate in her testimony?
MORAN: Obviously, yes.

11 AA 2389. Again, the focus is on Moran's statements as the prosecutor is merely questioning Moran regarding his inconsistent version of events.

The questioning in the fourth instance, involved Moran's testimony and his version of events:

MR. ROGAN: And you never were at Iris' apartment four days before her death and saw Victor there at the time?
MORAN: No, I haven't met that guy. I thought he was going totestify here, but no. [indiscernible].

> MR. ROGAN: But you called Fernando that day and asked him where he was?
> MORAN: I do remember calling him. Whether I asked him where he was or not, I don't remember. But I do remember calling him to invite him to go play ball or basketball or whatever.
> MR. ROGAN: But Fernando lied to you during that conversation?
> MORAN: He lied to me?
> MR. ROGAN: I'm asking you.
> MORAN: It's been a while. I don't remember what he says.
> MR. ROGAN: You don't remember?
> MORAN: No.

11 AA 2395. The focus is on Moran's statements as the prosecutor is merely questioning Moran regarding his inconsistent version of events.

Further, any conceivable alleged error is reviewed for harmless error. NRS 178.598 governs harmless error, and provides that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." Error is analyzed for harmlessness based on whether it was constitutional or nonconstitutional in nature. Constitutional error is evaluated by the test laid forth in Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824 (1967). The test under *Chapman* for constitutional trial error is "whether it is 'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" *Tavares*, 117 Nev. at 732 n.14, 30 P.3d at 1132 n. 14 (quoting Neder v. United States, 527 U.S. 1, 3, 119 S. Ct. 1827, 1830 (1999)). Nonconstitutional trial error is reviewed for harmlessness based on whether it had substantial and injurious effect

or influence in determining the jury's verdict. Knipes, 124 Nev. at 935, 192 P.3d at 1183.

Moran's speculative assertion that such alleged error substantially affected the jury's verdict, AOB at 46, is nothing more than a bare allegation. As discussed *infra*, the evidence supporting Moran's guilt is overwhelming.[10] To the extent that Moran claims that "the State drew further attention to this point in rebuttal argument," AOB at 46, this argument is unavailing as the jury received a contemporaneous curative instruction. 11 AA 2505-06. Additionally, the jury was properly instructed on direct and circumstantial evidence, objections, and witness credibility and the jury is presumed to follow district court orders and instructions. 5 AA 1174-75; Summers v. State, 122 Nev. 1326, 1333, 148 P.3d 778, 783 (2006). Therefore, any error was harmless and did not substantially affect the jury's verdict.

B. Disparagement

Next, Moran claims that "[t]hroughout rebuttal argument, the prosecutor repeatedly disparaged and belittled [Moran]'s testimony." AOB at 47. Specifically, Moran complains that "[t]he prosecutor characterized [Moran]'s testimony as a 'story' which 'doesn't make sense.'" Id. Additionally, Moran asserts that "[t]he

[10] To the extent that Moran claims that "[t]he State failed to present any direct evidence that [Moran] killed Iris," AOB at 46, or that "[t]he only evidence the State presents at trial which remotely connected [Moran] to Iris's killing was the 911 call," AOB at 45, as discussed *infra*, these claims are without merit.

prosecutor also argued to the jury that [Moran] was being dishonest." Id. In support of this contention, Moran references the following statements made during the State's rebuttal:

> And remember there's nothing in the Corolla. You didn't see a photo of his bedroom that shows all the stuff that he may have in there to sell. There's nothing in the Honda Pilot. Everything that you're talking about with this yard sale, you have to believe him. It's all relying on his statement. The question is do you believe him? Do you? Because there's not a sign in that car that says, stop, yard sale or anything like that.
>
> So do you believe him that he was out setting up for a yard sale? And does it make sense, his whole plan? I was just going to drive around and find a good location to hold this yard sale and I'm going to make notes about what good locations are and I'm going to accost people who are walking their dogs and ask them if it's okay to have a yard sale on their property. That's a bit weird, isn't it? That's a bit unbelievable.
>
> He's not being honest with you when he testified to that. Look at the story itself. It doesn't make any sense. And what also doesn't make sense about his story. If he decides on Thursday night, June 12th, I'm going to have a yard sale tomorrow. I'm going to get up at 4:00 a.m. and I'm going to go do this and find this location. What don't you do? Pawn stuff. The same stuff that you'll see selling at your yard sale? Why is he out less than 12 hours before pawning it?
>
> The answer is because he had no intention of doing a yard sale. It's something that he made up after the fact in an explanation for where he was for nearly five hours at the same time that Iris is murdered. This is make believe. It's a story that he made up to explain his behavior. And what else? Nobody saw him. For five hours he's gone and allegedly stopping people and asking them can I use your property?

11 AA 2497.

This argument was not disparagement of Moran's testimony. A prosecutor may comment on the credibility of defense witnesses. Evans, 117 Nev. at 630, 28

P.3d at 513. Further, a prosecutor may demonstrate to a jury through inferences from the record that a defense witness' testimony is palpably untrue. Ross v. State, 106 Nev. 924, 927, 803 P.2d 1104, 1106 (1990). Additionally, "statements by a prosecutor, in argument, . . . made as a deduction or conclusion from the evidence introduced in the trial are permissible and unobjectionable." Parker v. State, 109 Nev. 383, 392, 849 P.2d 1062, 1068 (1993) (quoting, Collins v. State, 87 Nev. 436, 439, 488 P.2d 544, 545 (1971)).

Moran concedes that he did not object to this instance of alleged "misconduct" at trial. AOB at 47. Claims of prosecutorial misconduct that have not been objected to at trial will not be reviewed on appeal unless they constitute "plain error." Leonard, 117 Nev. at 81, 17 P.3d at 415; See Mitchell v. State, 114 Nev. 1417, 971 P.2d 813, 819 (1998); Rippo v. State, 113 Nev. 1239, 946 P.2d 1017, 1030 (1997). Plain error review explores whether an error occurred, whether the error was plain or clear, and whether the error affected the defendant's substantial rights. Morales v. State, 122 Nev. 966, 972, 143 P.3d 463, 467 (2006); See also Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003)). An error is plain if it is so unmistakable that it is apparent from a casual inspection of the record. Nelson v. State, 123 Nev. 534, 543, 170 P.3d 517, 524 (2007). Here, any potential error did not affect Moran's substantial rights because, as discussed *infra*, there was overwhelming evidence of his guilt.

C. Burden shifting

Moran complains that "[d]uring rebuttal argument the prosecutor impermissibly commented upon [Moran]'s failure to produce evidence to corroborate his testimony," AOB at 48, which allegedly amounted to "improper burden shifting." AOB at 49. Moran concedes that he "did not object," AOB at 49, therefore, this claim should not be reviewed unless it constitutes plain error. Leonard, 17 P.3d at 415. Here, the prosecutor discussed the unreasonableness of Moran's version of events and never implied that Moran needed to produce evidence. 11 AA 2498. As the jury was properly instructed on the State's burden of proof and witness credibility, 5 AA 1173-75, and, as discussed *infra*, there was overwhelming evidence of his guilt, any potential error did not affect Moran's substantial rights.

D. Vouching

Moran asserts that "[d]uring rebuttal argument the prosecutor impermissibly vouched for the children's testimony." AOB at 49. Specifically, Moran references statements made by the prosecutor during rebuttal argument:

> I want to end with this thought. The Defendant talked today about his children. He talked about, in his letter, how his children were lying. They weren't telling the truth. They were making the deliberate choice to tell a falsehood to the police and presumably to you, through their testimony, right? Now why would they do that? What evidence do you have that Sarai and Fernando and Alan would make all of this up and conspire together to frame their father and stepfather for the brutal murder of their mother. It doesn't make any sense.

> It doesn't make any sense because Sarai, and Fernando, and Alan to an extent loved his mother and didn't want to see her die in the brutal fashion that she did. Want that – her to be here today. But according to the Defendant they're not telling the truth. They're lying. A logical step forward, the next implication, if you believe that they're lying is that they don't care who actually killed their mom. Their mom was so brutally murdered and they don't care who the actual killer is. They'd actually like to take this opportunity to lie and point the finger at that man over there for whatever reason. We don't know.
>
> And what's more is they came up with this story, this conspiracy within hours because they're talking to the detectives within hours of Iris' death. That doesn't make any sense. Why would they let the actual killer go and instead lie to frame this man that's standing right here. It's because they're not lying. They're telling the truth.

11 AA 2505.

A prosecutor is not permitted to place the prestige of the State behind its witnesses or suggest unadmitted evidence supports the credibility of a witness. Evans, 117 Nev. at 630, 28 P.3d at 513. However, a prosecutor may comment on the credibility of witnesses presented by the State as well as by the defense based on the evidence presented. Id. Prosecutors must be given "reasonable latitude" and "thus can argue reasonable inferences based on the evidence, including that one of the two sides is lying." Browning v. State, 120 Nev. 347, 359, 91 P.3d 39, 48 (2004).

Here, the prosecutor merely proposed a reasonable and proper argument based on Moran's testimony and evidence properly admitted at trial. The State may respond to defense theories and arguments. Williams v. State, 113 Nev. 1008, 1018-19, 945 P.2d 438, 444-45 (1997), receded from on other grounds, Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000). Additionally, upon objection, the district court

contemporaneously reminded the jury that argument made by counsel "is not evidence." 11 AA 2505-06. The jury was also properly instructed on objections, witness credibility, and arguments and opinions of counsel, and the jury is presumed to follow instructions. 5 AA 1174-75, 1182; Summers, 122 Nev. at 1333, 148 P.3d at 783. Moreover, Moran was convicted by the jury in light of overwhelming evidence. Therefore, any error was harmless and did not substantially affect the jury's verdict.

7. The State presented sufficient evidence to convict Moran of the charged crimes.

The standard of review for sufficiency of the evidence upon appeal is "whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998). "[I]t is the jury's function . . . to assess the weight of the evidence and determine the credibility of the witnesses." Id.

A. Burglary

Moran claims that "the State did not present any evidence [Moran] actually entered Iris' apartment," AOB at 52, and therefore, alleges that the State failed to prove Moran's "felonious intent upon entry" sufficient to convict Moran of burglary. Id. A person who, by day or night, enters any house, room, apartment, or other building, with the intent to commit grand or petit larceny, assault or battery on any

person or any felony, is guilty of burglary. NRS 205.060(1). Here, Iris was found near the front door of her home and photographs of her body and the crime scene demonstrated that she was attacked immediately upon entry. 8 AA 1795-97. Moran brought rope with him, which he used to bind Iris. 8 AA 1809. Additionally, Moran was not welcome in Iris' apartment. Further, nothing in the home was disturbed—except Iris' purse. 8 AA 1811-12. Iris was found still wearing jewelry. 9 AA 1953-54. Also, the jury viewed Moran's testimony and it is their job "to . . . determine the credibility of the witnesses." Origel-Candido, 114 Nev. at 381, 956 P.2d at 1380. Thus, because a rational jury could have found—and did find—Moran guilty of burglary beyond a reasonable doubt, there is sufficient evidence to sustain Moran's conviction.

B. Kidnapping

Moran does not contest that the State did not present sufficient evidence to convict him of kidnapping and instead, appears to contest his conviction in the context of dual liability for kidnapping and murder. AOB at 52-59. In Pascua, this Court held:

> Just as with kidnapping and robbery, we conclude that "where the seizure, restraint or movement of the victim substantially exceeds that required to complete the associated crime charged," dual convictions under the kidnapping and murder statutes are proper. Although we are cognizant that seizure, restraint, or movement often occurs incidental to the underlying offense of murder, there are certainly situations in which such seizure, movement, or restraint substantially exceeds that required to complete the murder.

122 Nev. at 1006, 145 P.3d at 1034. In upholding Pascua's dual convictions of kidnapping and murder, the Court found that

> . . . the movement of [the victim] could have been found by the jury to have had the independent purpose of torturing Upson into revealing the location of the sports book ticket. It also enhanced Pascua's opportunity to further assault [the victim] while keeping [the victim] away from the broken window and unable to move. Hence, the jury could have found that [the victim]'s movement to the bed substantially exceeded that required to complete the associated crime, since it lessened his chances of being found or being able to escape while providing Pascua with greater opportunity to cause further harm to Upson. Therefore, we affirm Pascua's dual convictions of kidnapping and murder.

Id.

Moran's contention that he "could not be guilty of both murder and kidnapping because . . . [Iris'] detention, i.e. tying her hands, could never increase her risk of harm," AOB at 56, defies logic and reason. Despite Moran's attempt to characterize Iris' restraint as incidental, this contention is unavailing. Many facts indicate that Iris sustained a tortuous beating. Iris left MGM at 4:58 a.m. and Moran did not return home until 8:45 a.m.—nearly four hours later. 10 AA 2097; 9 AA 1902. Both of Iris' hands were bound with rope behind her back. 8 AA 1809. Additionally, Iris had defensive wounds on her hands and forearms and her own hair was found in her hands—indicative of someone putting her hands up to protect

herself.[11] 10 AA 2093-94. Further, Iris' teeth were knocked out during the savage beating, with fragments landing across the room. 8 AA 1835.

Binding Iris' hands afforded Moran the opportunity to further assault Iris while keeping her unable to move or defend herself thus, lessening her chances of escaping or reaching out for help while providing Moran with greater opportunity to cause further harm. Binding Iris' hands clearly increased her risk of harm that substantially exceeded that required to complete the murder and had independent significance because it subjected her to a defenseless, prolonged beating that ultimately led to her death.

C. Murder

Moran asserts that because "the State presented insufficient evidence that [Moran] was the person who actually entered Iris' apartment . . . the State could not present sufficient evidence that [Moran] murdered Iris under either a theory of felony murder or premeditation and deliberation." AOB at 59. Pursuant to NRS 200.010(1),

[11] Moran asserts that "[b]ecause Iris had her own hair in her hands . . . her hands could not have been tied behind her back prior to any blows," AOB at 58, that ". . . it appears the assailant tied Iris's hands behind her back only after she died," Id., and therefore, "the tying was incidental to the murder or the infliction of substantial bodily harm, did not increase Iris' risk of harm, nor have independent significance." Id. at n. 30. However, this assertion is nothing more than unavailing speculation as it is not unthinkable that Iris was beaten for a period of time before her hands were tied. After which, the beating continued while she was defenseless. In fact, Detective Long testified that "[Iris] had at some point during this event had been bound with her hands behind her back." 10 AA 2093.

murder is the unlawful killing of a human being with malice aforethought. Murder of the first degree is murder which is committed in perpetration or attempt of a kidnapping or burglary, or by any other kind of willful, deliberate and premeditated killing. NRS 200.030(1)(a)-(b). A "deadly weapon" is any weapon, device, instrument, material or substance which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing substantial bodily harm or death. NRS 193.165(6)(b).

As argued *supra*, the State sufficiently demonstrated that Moran was the person who burglarized Iris' home and murdered her. Moran had a history of violence and threats made toward Iris. 6 AA 1323. Iris' son, Alan, testified that Moran did not have permission to use his car on the morning of the murder, that Moran's mention of a "yard sale" was the first time that he had ever spoken to Alan regarding a yard sale, and that in six years he had never observed Moran conduct a yard sale. 9 AA 1901-03. After the murder, Moran used Iris' cellphone to dial 9-1-1. 8 AA 1792; 9 AA 1914-1915; 10 AA 2113-14. During the call, Moran had stated that the incident had occurred at apartment number "873," the same number that he later repeated to the police. 8 AA 1793; 10 AA 2104. Further, Moran's rope was used to bind Iris' hands. 8 AA 1809. Therefore, the State presented sufficient evidence to sustain Moran's conviction. Origel-Candido, 114 Nev. at 381, 956 P.2d at 1380.

Regarding Moran's contention that the State failed to demonstrate the use of a deadly weapon to murder Iris, AOB at 59-60, this claim is without merit. At trial, Detective Terri Miller—based on 23 years of experience—testified that Iris' injuries were caused by a weapon and that it was not uncommon to not recover a weapon from a murder scene. 8 AA 1836. Further, Dr. Lisa Gavin, Forensic Pathologist and Medical Examiner, testified that typically "knives or sharp objects" cause incised wounds like the ones sustained by Iris and that some of the injuries "can occur by an object being banged in to the head." 10 AA 2212, 2220. Therefore, the State presented sufficient evidence to sustain Moran's conviction. Origel-Candido, 114 Nev. at 381, 956 P.2d at 1380.

8. Moran has not demonstrated cumulative error.

Claims of cumulative error are reviewed based on the following factors: (1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged. Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 854-55 (2000). As the State presented overwhelming evidence of Moran's crimes, the issue of his guilt was far from close. Further, Moran has failed to demonstrate any instance of error. Additionally, Moran was convicted of a brutal kidnap and murder where he bound Iris and beat her to death. Therefore, Moran has failed to demonstrate cumulative error warranting reversal.

CONCLUSION

Based on the foregoing reasons, the Judgment of Conviction should be AFFIRMED.

Dated this 1st day of August, 2016.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the type-volume limitations of NRAP 32(a)(8)(B) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 13,823 words.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 1st day of August, 2016.

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on August 1, 2016. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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